neck, and, according to the defendant's testimony, advanced toward him. The defendant fired five times, and the thief died soon after.

The jury, instructed to find the prisoner guilty if they believed the theft was committed and the thief was fleeing from the place, brought in a verdict of murder in the second degree.

An appeal was then brought, and it turns out that under the Texas idea of justifiable homicide the verdict cannot stand. The court below erred in refusing an instruction, asked by the defendant, that if the deceased were within gunshot of the place where he had stolen, the shooting was justifiable, no matter how completely he had abandoned the property or how desperately he was attempting to flee. The code expressly puts among the exceptions to the rule that the killing must take place before the offence has been committed, the following: "In case of burglary and theft by night the homicide is justifiable at any time while the offender is in the building or at the place where the theft is committed, or is within reach of gunshot from such place or building."

Perhaps an adequate criticism of this remarkable way of discouraging theft is suggested in the court's quiet remark that "This statute of ours, in so far as this and other enumerated exceptions are concerned, is an invasion upon the rule of the common law, and is, so far as we know, *sui generis*."

THE LAW SCHOOL.

LECTURE NOTES.

[These notes were taken by students from lectures delivered as part of the regular course of instruction in the School. They represent, therefore, no carefully formulated statements of doctrine, but only such informal expressions of opinion as are usually put forward in the class-room. For the form of these notes the lecturers are not responsible.]

REPUDIATION OF CONTRACTS. — (*From Professor Williston's Lectures.*) — The point at issue is this: Suppose a contract between A and B by which B contracts to sell land to A on December 1; if A before that time erects a house on it, which A contracts to do, now in case B on November 1 notifies A that he will not carry out his contract, what are A's rights? Is he entitled to sue B *immediately*, alleging as a breach the failure of B to perform?

It would seem that B was not bound to perform his promise to convey the land until after he had received performance of the condition precedent.

Two views are open: (1) The first, which has the weight of authority on its side, is that the notice operates as a repudiation of the contract, and that A may treat this as a breach of contract just as if B had failed to perform, and may sue for this breach; (2) The second view treats the case as analogous to prevention by B of performance of a condition precedent, and the breach should be laid on the implied covenant by B to receive A's performance or not to prevent it.

Now when B on November 1 announces that he will not perform his promise on December 1, what constitutes the breach of contract? The announcement alone is not the essential thing. B has a perfect right to say whatever he likes, provided he is ready to perform on the appointed day. But a change in the situation comes if A *acts* on the refusal; that is, as soon as B has really prevented A's performing his

condition precedent. The prevention is the essential point. Until A has by taking action (which may consist either in doing what he would not otherwise have done, or in refraining from doing what he would have done) changed his position upon B's notice to him, there is no reason why the contract should be treated as broken merely by B's *words* alone. A should have no cause of action. The moment, however, that A takes such action and thus renders it impossible, inconvenient, or nugatory to perform his condition, at that time B has really prevented him from performing it. And B having made A's performance impossible by his own act, cannot take advantage of its non-performance.

We may show clearly that A has really been prevented by looking at the law of damages. It is a rule of that branch of the law that a party cannot enhance damages by his own act, and hence that after notice by the defendant that he rejects the contract, the plaintiff *cannot* go on and perform, or at least that if he does so he will not be permitted to recover damages. *Clark* v. *Marsiglia*, 1 Denio, 317; *Dillon* v. *Anderson*, 43 N. Y. 232; *Black* v. *Woodrow*, 39 Md. 217; *Heaver* v. *Lanahan* [Md.], 22 Atl. Rep. 263; *Collins* v. *Delaporte*, 115 Mass. 159; *Danforth* v. *Walker*, 37 Vt. 240, 40 Vt. 387; *Cameron* v. *White*, 74 Wisc. 425. If this is a strict rule, then it is true that notice of rejection by B is a literal prevention of performance.

This is the law to be laid down in cases of contracts for sale of land on an appointed day. If B sells off the land before that day, or otherwise makes it apparently impossible for himself to be able to perform as agreed, still A cannot sue for breach, or refuse to buy, if *at* the time appointed B is ready to sell, *unless* A has acted in some way during the meantime on the faith of B's apparent repudiation. Cf. *James* v. *Burchell*, 82 N. Y. 108.

Assuming, then, that A assigns in his declaration a breach of an implied agreement by B not to prevent and to accept performance under the contract, it remains to be considered at what time he may bring action. It must be seen that if B has repudiated and A acted on that, the rights of the parties are fixed at that time, and no later retractation by B can alter A's right to sue. It is also evident that A's cause of action against B does not arise until some performance under the contract by B is due and has not been performed. *Daniels* v. *Newton*, 114 Mass. 530, *contra* to the English law as expressed on *Hochster* v. *Delatour*, also in 14 N. E. Rep. 436 and 8 So. Rep. 450. It seems that such failure to perform may consist either in not receiving and accepting plaintiff A's performance, or in a failure by the defendant B to keep his principal promise. Hence A would have no right to bring action until December 1.

The cases of marriage where B promised to marry A on December 1, and marries C on November 1 (42 N. Y. 246, *Short* v. *Stone*, Langd. Cases Con.), may perhaps be differentiated on this ground, that the mutual promises to marry imply further promises that in the meantime the parties will occupy the relation of betrothed to one another, and B's marriage on November 1 constitutes a breach of the latter promise. Unless these cases can be explained in this way, they must be regarded as pure exceptions to what seems the true rule, that a plaintiff must wait until the time for defendant's performance comes before he can bring suit for breach of defendant's contract.